STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 29, 2000
v CARL WILSON, Defendant-Appellant.	No. 212485 Saginaw Circuit Court LC No. 98-015038-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v WILLIAM HOWARD WILSON, JR., Defendant-Appellant.	No. 212486 Saginaw Circuit Court LC No. 98-015039-FC

Before: Smolenski, P.J., and Griffin and Neff, JJ.

PER CURIAM.

Following a joint jury trial, brothers and codefendants Carl Wilson and William Howard Wilson, Jr., were convicted of multiple charges stemming from an armed robbery that occurred in a Meijer's parking lot on Thanksgiving Day. At trial, defendant Carl Wilson admitted that he robbed a woman of her purse at gunpoint as she approached her vehicle. The robbery set off a series of chases in which Carl Wilson allegedly fired several shots, first at a Meijer's customer who chased him as he ran through the parking lot and later at customers who followed the getaway car. In addition, immediately before apprehension, defendant Car Wilson shot and injured "Mohawk," a police dog. The getaway car was owned and allegedly driven by defendant William Howard Wilson, Jr.

Defendant Carl Wilson appeals by right his convictions and sentences of ten to twenty years' imprisonment for conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1); life imprisonment for armed robbery, MCL 750.529; MSA 28.797; life imprisonment for assault with intent to rob while armed, MCL 750.89; MSA 28.284; life imprisonment for two counts of assault with intent to murder, MCL 750.83; MSA 28.278; two to four years in prison for felonious assault, MCL 750.82; MSA 28.277; three to ten years' imprisonment for injuring a police animal, MCL 750.50(c)(2); MSA 28.245(c); and a mandatory two-year consecutive term for possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2).

Defendant William Howard Wilson, Jr., appeals by right his convictions and sentences of ten to twenty years' imprisonment for conspiracy to commit armed robbery and/or assault with intent to murder, MCL 750.157a; MSA 28.354; life imprisonment for armed robbery, MCL 750. 529; MSA 28.797; life imprisonment for assault with intent to murder, MCL 750.83; MSA 28.278; and a mandatory two-year consecutive term for possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). In each case, we affirm.

People v Carl Wilson

I

Defendant Carl Wilson first argues on appeal that the trial court abused its discretion in refusing to accept his attempted plea of guilty to the charge of armed robbery. We disagree.

We review a decision by the trial court not to accept a proffered plea of guilty under an abuse of discretion standard. *People v Bryant*, 129 Mich App 574, 577; 342 NW2d 86 (1983). Here, defendant has not sustained his burden of establishing an abuse of discretion.

On the second day of trial, defendant attempted to plead guilty to count II, the charge of armed robbery. In attempting to establish a factual basis for the plea, MCR 6.302, defendant stated that he was under the influence of cocaine when he committed the criminal acts. After defendant made the statement, the trial judge terminated the plea proceeding, stating "I don't think we've got a plea here . . . there may be an issue of intent . . . ."

Defendant contends on appeal that the trial judge acted prematurely without giving him the opportunity to establish the requisite intent, thereby forcing him to take the stand because of the refusal to take the plea. However, as the prosecutor aptly notes, in the context of this case, the plea was not part of a plea bargain; the defense and the prosecution intended to proceed to trial on the remaining charges, which would require admission of all the same evidence. Thus, defendant's assertion of prejudice from having to testify is merely speculative. In any event, as this Court stated in *Bryant*, *supra* at 577, "[n]o one has a constitutional right to have his plea accepted." Further, "merely because the factual basis could have been inferred does not mean that the trial court must therefore accept the plea." *Id*. Defendant's argument in this regard is therefore without merit.

II

Defendant next contends that the trial court erred in refusing to grant defendant's motion for a directed verdict on the two counts of assault with intent to commit murder. Defendant argues that there was no evidence that he was trying to kill anyone; the gun may have gone off by accident or "it is much more likely that the person shooting the gun was attempting to get away and was firing 'warning shots' in order to scare off the people involved." Again, we disagree.

We review the record de novo. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). Considering all the evidence presented by the prosecution in the light most favorable to the prosecution, a directed verdict is inappropriate where a rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt. *Id.* Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). "Even in a case relying on circumstantial evidence, the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide." *People v Konrad*, 449 Mich 263, 273, n 6; 536 NW2d 517 (1995). See also *People v Carson*, 189 Mich App 268, 269; 471 NW2d 655 (1991).

To prove the crime of assault with intent to murder, the prosecutor must show: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Addressing the sufficiency of evidence issue in the context of this offense, this Court has noted, "[i]ntent, like any other fact, may be proven indirectly by inference from the conduct of the accused and surrounding circumstances from which it logically and reasonably flows." *People v Johnson*, 54 Mich App 303, 304; 220 NW2d 705 (1974).

In this case, one of the counts of assault with intent to commit murder pertained to a Meijer's customer who chased defendant through the parking lot and around the corner of the building as defendant headed to the getaway car. The customer came within seven or eight feet of defendant but stopped when defendant pulled out a gun and shot at him. Although he was not hit, the customer testified that he felt the bullet go right by his ear.

The second count evolved from subsequent events. Two other Meijer's customers followed defendant from the initial crime scene in their Jeep. The car in which defendant was riding left the area at a high rate of speed and eventually pulled into a gravel parking lot. Defendant got out of the passenger side of the car and pulled out a revolver with a five-inch barrel. According to the witnesses in the Jeep, defendant fired three shots at the Jeep as it passed the rear of defendant's vehicle. One of the witnesses thought he heard a bullet hit the vehicle; the Jeep had a flat tire a short time later.

These circumstances provided a sufficient basis from which a rational finder of fact could conclude, viewing the evidence in the light most favorable to the prosecution, that the essential elements of assault with intent to murder were proved beyond a reasonable doubt. Defendant fired a gun at the witnesses at close range while they were attempting to assist in his apprehension for a crime. Under these circumstances, the requisite intent to murder could reasonably be inferred. *Johnson, supra*. We

therefore conclude that the trial court properly denied defendant's motion for a directed verdict on theses charges.

III

Defendant next cites several instances of prosecutorial misconduct that purportedly denied him a fair trial. We review prosecutorial misconduct issues on a case by case basis. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* This Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Id.* "Appellate review of improper prosecutorial remarks is generally precluded absent objection by counsel because the trial court is otherwise deprived of an opportunity to cure the error." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). "An exception exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice." *Id.*

Defendant first maintains that in his closing argument the prosecutor brought out facts not in evidence, in particular, remarks concerning the fact that the tire on the Jeep had been shot out by a bullet. There was no objection to this remark. Generally, prosecutors are accorded great latitude regarding their arguments and are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

In this instance, the testimony at trial indicated that defendant fired three shots at the Jeep. The driver of the Jeep testified that he thought he heard a bullet hit the vehicle and within a short time he had a flat tire. A passing police officer testified that she was flagged down by a man and a woman in a red Jeep who informed her of a robbery and shooting. 911 dispatch transmissions admitted into evidence reflected a call from the officer concerning the fact that the Jeep's tire had been shot out. Thus, although no witness actually testified that a bullet was the cause of the flat tire, the prosecutor, in his argument, drew a reasonable inference from the evidence adduced at trial. We find neither a gross misstatement of this tangential evidence as defendant claims nor, in the absence of an objection, a miscarriage of justice. *Bahoda*, *supra*.

Under the guise of alleged prosecutorial misconduct, defendant next contends that irrelevant information, not objected to at trial, was admitted into evidence. In particular, defendant cites the testimony of two police officers who testified to defendant's statement that he had been smoking cocaine and drinking alcohol and said, "I'm sorry about that God damned cocaine." This issue entails not the conduct of the prosecutor, but rather the evidentiary ruling of the trial judge. As such, we review the allegedly improper admission of evidence for an abuse of discretion. *People v Smith*, 456 Mich 543, 549-550; 581 NW2d 654 (1998). Furthermore, in the absence of an objection, this Court may not review this issue unless there was a "plain error that affected substantial rights" and defendant is actually innocent or the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *Carines*, *supra* at 774.

Defendant's statements were made at the hospital where he had been accompanied by police officers immediately after his apprehension. These admissions (see MRE 801(d)(2)) regarding defendant's use of cocaine immediately prior to the crimes were certainly relevant and admissible to explain defendant's conduct, reactions, and intent. MRE 401, 402; *People v Mills*, 450 Mich 61, 71; 537 NW2d 909 (1995), mod 450 Mich 1212; 539 NW2d 504 (1995). Thus, the statements made by defendant were properly admitted into evidence by the trial court.

Our rationale and conclusion applies equally to defendant's argument concerning the prosecutor's allegedly improper cross-examination of defendant about his use of cocaine before going to Meijer's on the day in question. In the absence of an objection by defense counsel, any error in the admission of this evidence is harmless in light of the overwhelming evidence of guilt against defendant. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

The remaining facets of defendant's arguments alleging prosecutorial misconduct and ineffective assistance of counsel arising out of these claims do not warrant further review for lack of merit. *Stanaway, supra* at 687-688.

IV

Defendant next asserts for the first time on appeal that the statements he made at the hospital to medical personnel, which were overheard by the police officers, should have been excluded from evidence pursuant to the physician/patient privilege. Because defendant did not raise the issue of privilege before or at trial, the issue is waived. *People v Hoffman*, 205 Mich App 1, 14; 518 NW2d 817 (1994). In any event, the circumstances in which the statements were given do not lend support to defendant's claim that the remarks were intended to be privileged or that they fall within the scope of the statutory privilege, MCL 600.2157; MSA 27A.2157.

V

Defendant argues that the trial court committed error requiring reversal by failing to give defendant's requested instruction on the reckless use of a firearm. We disagree.

In *People v Stephens*, 416 Mich 252, 261-265; 330 NW2d 675 (1982), our Supreme Court set forth the following test justifying a lesser included misdemeanor instruction: (1) a specific request has been made; (2) there exists an appropriate relationship between the charged offense and the requested misdemeanor; (3) the requested misdemeanor is supported by a rational view of the evidence; (4) if the prosecution requests the misdemeanor instruction, the defendant has adequate notice of it as one of the charges against which he is expected to defend; and (5) the requested instruction does not result in undue confusion or some other injustice. See also *People v Hendricks*, 446 Mich 435, 444-446; 521 NW2d 546 (1994); *People v Acosta*, 143 Mich App 95, 99-100; 371 NW2d 484 (1985). The failure to give such an instruction is an abuse of discretion if a reasonable person would find no justification or excuse for the ruling made. *People v Malach*, 202 Mich App 266, 276-277; 507 NW2d 834 (1993).

"[D]efense counsel must adequately apprise the trial judge of exactly what lesser included offenses are being requested; a general request for 'the lesser included offense' will not suffice." *Stephens, supra* at 261-262. In the present case, it is not clear whether the proper request was made by defendant because defense counsel did not specify exactly what lesser instructions he was requesting. Several "reckless use" instructions exist in our state based on variations in the applicable statutes. See, e.g., MCL 752.861 *et seq*.; MSA 28.436(21) *et seq*. Further, a rational view of the evidence does not support the instruction in view of the multiple firings of the weapon by defendant. *Stephens, supra*; *Acosta, supra* at 102. For these reasons, we conclude that the trial court did not err in denying defendant's request for a lesser included misdemeanor instruction.

VI

Defendant next argues that resentencing is required because the trial court did not sufficiently articulate the reasons for the sentence imposed. "[T]he trial court must at the time of sentencing articulate on the record its reasons for imposing the sentence given." *People v Coles*, 417 Mich 523, 549; 339 NW2d 440 (1983), overruled in part on other grounds in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). In this case, the trial judge did so as follows:

> I'm taking into account the prior record. There's four – three prior felony convictions plus the fact that any number of people were in danger in this firing at the Meijer's parking lot. Even if you didn't hit other people. Both situations, both inherently dangerous.

This explanation constituted adequate articulation of the reasons for the sentences imposed. *People v Triplett*, 432 Mich 568; 442 NW2d 622 (1989).

VII

Finally, defendant maintains that his sentences violate the principles of proportionality set forth in *Milbourn, supra*. We disagree.

Sentences are reviewed on appeal for an abuse of discretion. *People v Houston*, 448 Mich 312, 319; 532 NW2d 508 (1995). A sentence constitutes an abuse of discretion if the sentence violates the principle of proportionality by being disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Milbourn, supra* at 635-636; *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995).

Defendant's background, including his extensive criminal record, was reflected in the presentence investigation report provided to the trial court for its consideration and review. The trial court, in sentencing defendant, expressly noted his three prior felonies. Moreover, the court appropriately recognized the dangerous circumstances surrounding the instant offenses. Defendant fled the scene of the armed robbery at high speeds in a vehicle with the codefendant driver and, as he fled, he shot his revolver at people in a crowded parking lot, on a public highway, and yet again in a residential neighborhood. We conclude that defendant's sentence accurately reflected the

dangerousness of his crimes and the specific circumstances in which they were committed, as well as his proven inability to conform his conduct to the laws of society. The sentences imposed by the trial court were proportionate to the offense and the offender. *Milbourn, supra*.

People v William Howard Wilson, Jr.

I

Defendant William Howard Wilson, Jr., brother of codefendant Carl Wilson, raises five issues on appeal. He first alleges that the trial court abused its discretion in failing to grant defendant's motion for separate trials. We disagree.

This Court reviews a trial court's grant or denial of a motion for severance for an abuse of discretion. *People v McCray*, 210 Mich App 9, 12; 533 NW2d 359 (1995). The defendant has the burden of demonstrating that his substantial rights were prejudiced and that severance was necessary as a means of rectifying the prejudice. *People v Hana*, 447 Mich 325, 331, 346; 524 NW2d 682 (1994); MCL 768.5; MSA 28.1028; MCR 6.121(D). See also *People v Cadle (On Remand)*, 209 Mich App 467; 531 NW2d 761 (1995). Although the *Hana* Court recognized that a joint trial of codefendants presenting antagonistic defenses may have serious negative consequences for the accused, *id*. at 347, the Court expressly rejected a severance rule per se when antagonistic defenses are alleged:

> Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be "mutually exclusive" or "irreconcilable." . . . Moreover, "[i]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice." *United States v Yefsky*, 994 F2d 885, 896 (CA 1, 1993). The "tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other." *Id*., p 897. [*Id*. at 349.]

In the present case, defendant has not sustained his burden of demonstrating the requisite prejudice. *Id*. His proffered defense at trial was that he was not involved in the Meijer's parking lot robbery and that he was merely an innocent bystander. Codefendant Carl Wilson's testimony concerning defendant's involvement did not conflict with this defense. Carl testified that defendant was not the driver of the getaway car; rather, a person named "James" was driving at the time of the robbery (although Carl Wilson did not know James' last name or address and had only recently met him walking down the street). Thus, codefendant Carl Wilson's testimony, while implausible and in retrospect probably not beneficial to defendant, supported defendant's defense and was not irreconcilably antagonistic so as to support defendant's claim that his substantial rights were prejudiced by the failure to sever the trials. *Hana, supra*.

II

Defendant next claims that the prosecution failed to present sufficient evidence to sustain a verdict of guilty beyond a reasonable doubt on the four charged offenses of conspiracy, armed robbery, assault with intent to commit murder, and felony-firearm. We disagree. Although the evidence against defendant was circumstantial, it was sufficient for the jury to find defendant to be an aider and abettor of the crimes for which he was convicted.

On appeal, a claim of insufficiency of evidence is reviewed in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the elements of the offense established beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979). See also *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

The prosecution in this case relied on an aiding and abetting theory. Aiding and abetting, MCL 767.39; MSA 28.979, consists of "all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). Aiding and abetting entails proof that

> (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement . . . . An aider and abettor's state of mind may be inferred from all the facts and circumstances . . . . Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. [*Id*. at 569.] [citations omitted.]

See also *Carines, supra* at 758.

Viewing the evidence in a light most favorable to the prosecutor, we conclude that there was sufficient evidence to permit the jury to infer that defendant, as an aider and abettor, committed the offense of armed robbery. See *People v Norris*, 236 Mich App 411; 600 NW2d 658 (1999); *People v Martin*, 150 Mich App 630, 634-635; 389 NW2d 713 (1986). Defendant claimed that he was not at the Meijer's parking lot when the robbery occurred but had been "driving around by himself for about forty minutes" before picking up his brother at the Food Basket store shortly before he and his brother were stopped by the police. However, this time frame testified to by defendant does not coincide with the fact that defendant and codefendant were apprehended in defendant's vehicle by the police less than thirty minutes after the armed robbery occurred. Moreover, although there was no on-scene identification of defendant at the Meijer's parking lot, defendant's car was identified by description and license number as the getaway vehicle. The testimony at trial established that after a shot was fired by codefendant in the parking lot, codefendant got into the passenger side of the getaway car parked in an area to facilitate a prompt exit. The car, driven by a black male, sped from the scene. Several blocks from Meijer's, defendant's car suddenly stopped and codefendant Carl Wilson got out of the car and fired three shots at the witnesses who had followed the getaway vehicle. Defendant was driving the vehicle with his brother, the perpetrator, riding as his passenger, when the police converged on the getaway car less than thirty minutes after the armed robbery. Defendant bailed out with the car still in gear and fled on foot, running for several blocks until apprehended. At that point, defendant stated, "OK you caught me." Found in defendant's possession (in his pocket) was a crisp $50 bill

matching the description of the $50 bill taken from the robbery victim. In addition, the victim's checkbooks were found in defendant's car, clearly visible on the center console, along with her MCI card and the hooded sweatshirt matching the description of that worn by codefendant Carl Wilson during the robbery. Given these circumstances, the evidence was more than sufficient for the jury to find that defendant was an aider and abettor of the charged offense of armed robbery. *Martin, supra*.

The evidence likewise was sufficient to support the conviction of defendant as an aider and abettor of assault with intent to murder the two witnesses who followed the getaway vehicle. See, generally, *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The requisite intent, which "may be inferred where the natural tendency of behavior is to cause death or great bodily harm," *People v Anderson*, 112 Mich App 640, 649; 317 NW2d 205 (1981), is evident from the manner in which the three shots were deliberately taken at the two witnesses in their Jeep as they passed in close proximity to defendant's vehicle following the robbery. *People v Johnson*, 54 Mich App 303, 304; 220 NW2d 705 (1974).

Similarly, the proofs set forth above more than sufficiently proved the elements of the charged offense of conspiracy. See *People v Justice (After Remand)*, 454 Mich 334, 345-346; 562 NW2d 652 (1997).

With regard to defendant's felony-firearm conviction, "[o]ne who does not actually possess a firearm may validly be convicted of felony-firearm as an aider and abettor . . . . However, the person must aid and abet either the acquisition or retention of the gun." *People v Eloby (After Remand)*, 215 Mich App 472, 478; 547 NW2d 48 (1996). "It is sufficient that the defendant intentionally assisted or aided the principal's possession of a firearm under circumstances that constituted a felony-firearm offense with respect to the principal." *People v Nix*, 165 Mich App 501, 505; 419 NW2d 7 (1987).

In this case, defendant aided in the retention of the revolver used by codefendant Carl Wilson during the course of the crimes. Codefendant's revolver, visible to the victims during the criminal enterprise, certainly would have been readily evident to defendant as the perpetrators left the scene of the armed robbery and fled together in defendant's vehicle, firing shots at pursuing witnesses in the process. Thus, viewed in a light most favorable to the prosecution, the evidence supported defendant's conviction as an aider and abettor of felony-firearm in light of defendant's acts in aiding or abetting retention of the gun which codefendant used for the robbery and subsequent assaults.

Lastly, we note that with regard to all of the charged offenses, defendant's flight from the police is evidence of guilt, *Turner, supra*, as is defendant's statement upon apprehension. Although codefendant Carl Wilson testified at trial that an unidentified individual known only as "James," not defendant, was involved in the robbery and was the driver of the getaway car, this Court will not disturb the jury's determination of the credibility of this testimony and the witness. *Norris, supra* at 421-422. There was sufficient evidence for a rational trier of fact to conclude that the elements of the charged offenses were proved beyond a reasonable doubt. *Hampton, supra*.

III

Defendant next claims that he was denied a fair trial by prosecutorial misconduct during the course of final argument to the jury. We disagree.

Defendant first alleges that in closing, the prosecutor misstated the law regarding conspiracy and misrepresented evidence presented at trial. Reviewed in context, these errors, if any, were cured by the trial court's cautionary instructions to the jury that counsel's argument was not evidence and that the law was as it was given by the court. In addition, the trial court clearly set forth the applicable law on each charge. Any impropriety could have been and was cured by these cautionary instructions. *Bahoda, supra* at 282-283; *Stanaway, supra* at 687; *People v Ullah*, 216 Mich App 669, 682-683; 550 NW2d 568 (1996).

Defendant further claims that during rebuttal argument the prosecutor denigrated defendant and his defense counsel. Specifically, defendant maintains that the prosecutor engaged in improper burden shifting by impermissibly interjecting economic status as a motive for the crimes, argued his personal belief in defendant's guilt, and urged the jury to do its civic duty by convicting defendant. However, no objection was made to these arguments which, reviewed in context, were proper argument responsive to the evidence, theory, and arguments of the defense. *People v Fields*, 450 Mich 94, 110-111; 538 NW2d 356 (1995); *Bahoda, supra* at 282. Any prejudicial effect could have been cured by cautionary instructions to the jury. *Stanaway, supra* at 687; *Ullah, supra* at 679, 682.

Moreover, our review of the record indicates that the prosecutor merely thanked the jury for their attention on behalf of the named victims, police officers, and the people of the community and then concluded his argument by asking for a verdict of guilty. Such a reference neither asked the jury to put themselves in the victim's place nor asked them to sympathize with the jury. *People v Truong (After Remand)*, 218 Mich App 325, 339-340; 553 NW2d 692 (1996).

IV

Next, defendant alleges that the jury instructions given by the trial court were not clear and understandable and further, that specific instructions regarding the issues of intoxication and identification were not given. However, because defendant did not object to the jury instructions, appellate review is precluded absent manifest injustice. *People v VanDorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

Jury instructions are to be reviewed as a whole, rather than in a piecemeal fashion, to determine if there is error. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997). Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id*.

In the present case, defendant has not identified with specificity the alleged erroneous jury instructions that he claims were "rambling, convoluted and lacking in clarity." On the whole, the instructions were adequate with regard to the issues tried, the charges faced by each defendant and the elements the prosecutor was required to prove for each charge, including the requisite intent. *Perez-DeLeon, supra*. Defendant has failed to sustain his burden under *VanDorsten, supra,* that the unchallenged instructions resulted in manifest injustice.

In a related argument, defendant maintains that his trial counsel was ineffective in failing to request that the jury be properly instructed. To sustain such a claim, defendant must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Because there was no *Ginther*[1] hearing, our review of this issue is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Defendant has not sustained his burden of showing that in failing to object to the jury instructions defense counsel made a serious mistake which was outcome determinative. As previously noted, the instructions as given fairly covered the relevant issues. In light of all the evidence introduced pertinent to defendant's guilt, the error, if any, with regard to the alleged confusing instructions is harmless since defendant has not demonstrated that it is more probable than not that the error affected the verdict. *Lukity, supra*.

V

In his final claim on appeal, defendant raises two issues regarding his sentence. First, defendant argues that the trial court failed to articulate an adequate reason for the sentences imposed. See, generally, *Triplett, supra*. Defendant's argument is without merit. In sentencing defendant, the trial court made the following statement:

> I'm taking into account the seriousness of the situation, people's lives were in danger. Furthermore, you were on parole at the time for armed robbery and second-degree criminal sexual conduct.

Such articulation is adequate to justify the sentences. *Id*.

Second, defendant argues that his sentences are disproportionate under *Milbourn, supra*. The argument is meritless in view of the circumstances surrounding the offense and the offender. The nature of the crimes, the location in which they occurred, and defendant's reckless attempt to flee endangered the lives of countless people. Given his status as an habitual offender on parole at the time of the instant offenses, defendant's sentences reflected the dangerousness of the crimes and his inability to conform his conduct to the laws of society. For these reasons, the sentences did not violate the principles of proportionality, *Milbourn, supra,* and consequently, we conclude that the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Michael R. Smolenski
/s/ Richard Allen Griffin
/s/ Janet T. Neff

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).